

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey  
Joel Jacobs  
Marshall Johnson  
Mac McCollar  
Don Storm

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of MFS Communications  
Company's Petition for Arbitration with  
US WEST Communications, Inc. Pursuant to  
Section 252(b) of the Federal  
Telecommunications Act of 1996

ISSUE DATE: March 17, 1997

DOCKET NO. P-3167,421/M-96-729

ORDER APPROVING CONTRACT

**PROCEDURAL HISTORY**

On December 2, 1996, the Commission issued its ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A US WEST COST PROCEEDING (the Consolidated Arbitration Order) in Docket No. P-442,421/M-96-855; P-5321,421/M-96-909; P-3167,421/M-96-729 (the Consolidated Arbitration Docket). In that Order the Commission required AT&T Communications of the Midwest, Inc. (AT&T), MCImetro Access Transmission Services, Inc. (MCImetro), MFS Communications Company (MFS), and US WEST Communications, Inc. (US WEST) to submit final contracts containing all arbitrated and negotiated terms by January 2, 1997, for Commission review pursuant to 47 U.S.C. § 252(e). The Order provided that any party objecting to the language in any of the contracts should indicate the basis for the objection in a separate memorandum or brief filed at the same time as the contract.

The Consolidated Arbitration Order also provided a separate process for Commission consideration of any petition for reconsideration. The Commission noted that it "may consolidate any hearings on reconsideration with the hearings on the contract approval proceeding to ensure the most efficient resolution of the docket." Consolidated Arbitration Order at p. 12.

On December 12, 1996, AT&T and MFS filed petitions for reconsideration.

On December 12, 1996, US WEST filed a petition for reconsideration and a request for a stay of the Consolidated Arbitration Order.

On December 13, 1996, the Department of Public Service (the Department) filed a petition for reconsideration.

On December 23, 1996, MCImetro, MFS, the Department, and the Residential Utilities Division of the Office of Attorney General (RUD-OAG) filed replies to the reconsideration petitions. On the same date, AT&T filed a reply and a motion to strike certain documents included with US WEST's petition for reconsideration.

On January 3, 1997, two final contracts were submitted for Commission approval--one by US WEST, AT&T, and MCImetro; and one by US WEST and MFS.

On January 13, 1997, the Department, the RUD-OAG, and the Minnesota Independent Coalition (MIC) filed comments on the final contracts.

On January 17, 1997, US WEST filed a response to AT&T's request to strike portions of US WEST's petition for reconsideration.

The Commission met on January 31 and February 3, 1997 to consider all petitions for reconsideration, the interconnection agreement filed by AT&T, MCImetro, and US WEST, AT&T's motion to strike, and US WEST's request for a stay. Due to the pressures on Commission Staff, parties, and regulatory agencies from the timelines imposed by the Federal Act, the Commission decided to defer the contract approval process for the MFS/US WEST contract. The Commission was able to defer consideration of the MFS/US WEST contract because that contract was for the most part negotiated and therefore fell under the 90 day deadline for Commission approval or rejection under 47 U.S.C. § 252(e)(4). In contrast, the MCImetro/AT&T-US WEST contract was mostly arbitrated rather than negotiated, and therefore came under the 30 day deadline for Commission consideration under the Federal Act.

On March 17, 1997, the Commission issued its ORDER GRANTING RECONSIDERATION AND APPROVING CONTRACT AS MODIFIED, which reflected the Commission's February 3, 1997 resolution of all issues submitted for reconsideration by parties to the Consolidated Arbitration. In that Order the Commission discussed its resolution of four issues for which MFS had requested reconsideration and its clarification of two issues raised by MFS.

On March 3, 1997, the Commission met to consider approval of the MFS/US WEST contract, pursuant to § 252(e)(1) and (4) of the Federal Act.

## **FINDINGS AND CONCLUSIONS**

### **I. CRITERIA FOR CONTRACT REVIEW AND APPROVAL**

#### **A. General Criteria for the Contract Review Process**

The Federal Telecommunications Act of 1996 establishes a process in which state commissions review and approve interconnection agreements before the agreements can go into effect.

47 U.S.C. § 252(e). State commission approval is required of all interconnection agreements, whether they have been established by state commission arbitration or they have been developed by contractual negotiations. Section 252(e)(1) of the Federal Act requires state commissions to make written findings regarding "any deficiencies" they find in the agreements.

The Federal Act lists two grounds for rejection of agreements that have been arrived at through negotiation: 1) the agreement or a portion of it discriminates against a telecommunications

carrier that is not a party to the agreement; or 2) the implementation of the agreement or portion of it is not consistent with the public interest, convenience, and necessity. 47 U.S.C. § 252(e)(2)(A).

Under § 252(e)(2)(B) of the Federal Act, a state commission may reject an arbitrated agreement if it finds that the agreement does not meet the requirements of § 251, including the regulations prescribed by the FCC pursuant to that section, or the pricing standards set forth in § 252(d). The state commission may also reject an arbitrated agreement or portion thereof which is not consistent with the public interest, as determined by the commission's general regulatory authority.

Section 252(e)(3) of the Federal Act preserves to state commissions the authority to review negotiated or arbitrated interconnection agreements to see that they meet the requirements of state law, including relevant state quality of service standards.

## **B. The Commission's Authority to Approve the Contract with Modifications**

### **1. Comments of the Parties**

In this proceeding the parties disagreed regarding the Commission's authority to approve a negotiated interconnection agreement with modifications.

US WEST stated that § 252(e)(2)(A) of the Act allows the Commission to reject a negotiated contract only if the Commission finds that: 1) the agreement discriminates against a non-party telecommunications carrier; or 2) the implementation of the agreement would not be consistent with the public interest, convenience, and necessity.

US WEST also pointed to § 252(a)(1) of the Federal Act, which states that a voluntarily negotiated interconnection agreement may be entered into without regard to the standards set forth in § 251(b) and (c). Those standards provide the Act's basic guidelines for the elements of interconnection agreements, including such issues as resale, number portability, the provision of unbundled elements, and collocation.

From these provisions, US WEST drew two conclusions. First, the Commission must look at a negotiated agreement in a manner fundamentally different from the Commission's analysis of an arbitrated agreement. Because no party is alleging that this contract is discriminatory, the Commission may in this case only look at contract terms that fail to meet the public interest and necessity. The Commission may not look to the terms to decide if they are contrary to the principles of § 251. Second, US WEST stated that the Commission may only approve the contract or reject it with written findings. If the Commission rejects a term, the parties are free to renegotiate and resubmit the proposal. According to US WEST, the Commission lacks the authority to modify the term or to condition approval upon its modification.

At the March 3, 1997 Commission meeting, MFS found US WEST's interpretation of the Commission's scope of review over negotiated contracts too limited. MFS stated that § 252(e)(1) of the Act can be interpreted to mean that the Commission has the ability to approve a negotiated interconnection agreement with conditions or modifications. MFS also noted that

its Agreement with US WEST does not fit into any neat statutory pigeonhole--given the Parties' history of negotiation, then arbitration, further negotiations, partial negotiated settlement, and Commission resolution of certain issues in reconsideration.

## **2. The Commission's Finding**

The Commission finds that § 252(e) of the Federal Act provides the Commission with the latitude to approve, reject, or place conditions or modifications upon a negotiated agreement to ensure that the implementation of the agreement is consistent with the public interest, convenience, and necessity.

The "public interest, convenience, and necessity" is a term which evokes the broad range of the Commission's regulatory powers and duties. The Federal Act did not remove the Commission's authority and obligation to oversee the provision of telephone service in Minnesota. In order to exercise that authority, the Commission must continue to look at federal and state statutes and rules and apply its regulatory expertise and discretion to determine if a proposed agreement is consistent with the public interest. To allow the Commission less latitude than this would be to virtually read out of the statute the requirement that the agreement be consistent with the public interest, convenience, and necessity. To claim that the Commission cannot condition its approval upon the parties' conformity with the public interest would be to effectually remove the Commission from the process when agreements are negotiated--an event the Act does not contemplate and logic does not support.

While the negotiated agreement need not strictly conform to the provisions of § 251(b) and (c), as the arbitrated agreement must, the overall terms of the negotiated agreement must nevertheless be consistent with the public interest. In instances in which the Commission has found that terms in this proceeding are not consistent with the public interest and convenience and necessity, the Commission has made its approval conditional upon the parties' developing language to bring the contract into such conformity.

Finally, the Commission agrees with MFS that the history of this particular Agreement means that it does not fit neatly into any one of the categories contemplated by Congress in the Act. Particularly in this circumstance, the Commission must interpret the provisions of the Act in a manner which allows it the greatest opportunity to fulfill its regulatory duties under federal and state law.

## **II. INTRODUCTION AND SUMMARY OF THE ORDER**

The Commission carefully reviewed every term and condition of the Agreement submitted as a final contract between MFS and US WEST. After careful analysis, the Commission finds that most terms of the Agreement are consistent with the standards of the Federal Act, FCC Rules, relevant Minnesota law, and the public interest. The Agreement's essentially equitable and commercially reasonable terms reflect the parties' general cooperation throughout a lengthy negotiation period.

In some instances, in order for the terms to meet the reviewing standards, the Commission found it necessary to condition its approval upon modifications to the Agreement. In those cases, the Commission has explained its modifications in written findings. The Commission

will discuss those modifications and findings in the section below. The Commission will also set out the process by which the parties should develop and submit language to reflect the Commission's findings.

The Commission will begin with § XXXIV--Miscellaneous Terms--which contains general provisions in the contract, and then will proceed with the remainder of the modified contract sections in the order in which they appear in the contract.

### **III. THE MODIFIED CONTRACT TERMS**

#### **A. § XXXIV.R, Effective Date**

##### **1. The Contract Provision**

The contract as submitted provides that the effective date will be decided pursuant to §§ 251 and 252 of the Federal Act.

##### **2. Commission Action**

At the February 3, 1997 Commission meeting in the Consolidated Arbitration proceeding, the Commission established March 17, 1997 as the effective date for the AT&T/MCImetro-US WEST contract and the MFS-US WEST contract. All parties at the February 3 meeting agreed that the March 17 effective date allowed sufficient time for review of the contracts and prevented any new entrant from gaining an unfair advantage over similarly situated competitors.

At the March 3, 1997 meeting, MFS and US WEST confirmed their agreement with the March 17 effective date for the contract.

**The Commission will therefore set March 17 as the effective date for this contract.**

#### **B. § XXXIV.S, Amendment of Agreement**

##### **1. The Contract Provision**

This contract provision allows MFS and US WEST to reach a mutual written agreement to amend the Agreement. The Parties note that amendments may be necessary to implement the objectives of the Agreement, and agree to work cooperatively in any necessary amendment process.

At the March 3, 1997 meeting, MFS noted that in § XXXIV.B, Most Favored Nation Terms and Treatment, the Parties agreed that the provisions of § 252(I) of the Act will apply, including state and federal interpretive regulations in effect from time to time. The Parties thus agreed to be governed by any future interpretations of the "Most Favored Nation" concept<sup>1</sup>

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<sup>1</sup> Under the "Most Favored Nation" concept, a local exchange carrier (LEC) is required to make available any interconnection, service, or network element, provided under an

under state and federal statute and rules. MFS stated that a contract amendment process requiring Commission approval would not be appropriate, given the Parties' agreement.

US WEST argued that most terms of the Parties' Agreement had been reached by negotiation. The few that had not been resolved had been settled in the arbitration and reconsideration process. US WEST stated that this is a final negotiated contract--the Commission should not involve itself in future amendments.

## **2. Commission Action**

Unlike most commercial contracts, this Agreement has been subject to Commission oversight from the initial request for interconnection, through the lengthy negotiation/arbitration proceeding, on through reconsideration, and finally in the contract approval process. Throughout, the Commission has been charged with determining that the Agreement is consistent with the public interest, convenience, and necessity. The Commission must maintain its regulatory oversight of the provision of telephone service as the Agreement is finally implemented.

Given these circumstances, any amendment to the Agreement has the potential for jeopardizing the public interest. The Commission will therefore require Commission approval before the Parties amend any term of the contract. Commission approval of future amendments will ensure that the Parties' actual performance under the Agreement, as well as the terms themselves, conform to the public interest.

Finally, the Commission agrees with the Parties that the interpretation of the Most Favored Nation concept, among others, is currently in a state of development in the FCC and federal courts. That fact cannot prevent the Commission from fulfilling its regulatory duties in the present as best it sees fit. If, in the future, the Parties believe that a provision of the Agreement is no longer consistent with federal law, they are free to bring that matter back before the Commission.

**For these reasons, the Commission will require the Parties to add the following sentence to § XXXIV.S, Amendment of Agreement: Any amendment of the Agreement is subject to the approval of the Commission.**

## **C. § XXXIV.FF, Nondisclosure.**

### **1. The Contract Provision**

This section of the MFS/US WEST contract sets out the rules under which the Parties will handle proprietary information. The provisions set strict limits on sharing or disclosing the information.

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interconnection agreement to which it is a party, to any other requesting telecommunications carriers, upon the same terms and conditions.

US WEST argued that the Commission need not add any language regarding the Commission's access to the Parties' information. The Parties intend to conduct their business in a manner which is consistent with state law.

## **2. Commission Action**

These provisions contain normal and appropriate contract terms. The Commission notes, however, that this contract extends beyond the typical commercial agreement. The terms of this Agreement will govern the provision of telephone service in Minnesota by the major incumbent and a significant new entrant. It is therefore necessary for the Commission to have access to documents related to the Agreement so that the Commission can ensure that the provision of service under the Agreement is consistent with the public interest.

**The Commission will therefore condition its contract approval upon the Parties' adding the following language to this section: The Parties recognize and agree that the Commission may obtain any and all records of the Parties the Commission considers necessary to fulfill its duties under Minnesota and federal law.**

### **D. § XXXIV.GG, Notices.**

#### **1. The Contract Provision**

This provision requires any notices required by or concerning the Agreement to be sent to the Parties at their specific addresses.

#### **2. Commission Action**

The Commission will add to the list of parties to whom notices or other communications must be given or delivered:

**Executive Secretary**  
**Minnesota Public Utilities Commission**  
**121 Seventh Place East, Suite 350**  
**St. Paul, MN 55101-2147**

### **E. § XXXIV.KK, No Third Party Beneficiaries.**

#### **1. The Contract Provision**

This provision states: Except as specifically set forth in the Agreement, the Agreement does not provide third parties with any remedy, claim, liability, reimbursement, cause of action, or other privilege.

MFS stated that it does not object to the Commission's seeking intervention in any future proceeding regarding the Agreement, to the extent public interest issues are raised. MFS argued, however, that the wording of the Agreement should not seek to bind future courts regarding the Commission's status as a third party beneficiary. The Commission can make its case before any court on a case by case basis.

## **2. Commission Action**

As the Commission previously noted, this Agreement is more than an ordinary commercial contract. The Agreement marks the Commission's exercise of its authority to determine that interconnection contracts are consistent with the Federal Act, Minnesota law, and the public interest. The Commission has the duty to ensure that the public interest is served in matters concerning telecommunications. The Commission will therefore modify this provision to ensure that the Commission, on behalf of the general public, can exercise its rights and privileges as a third-party beneficiary of the contract. **The Commission will require the following language to be added to this provision: The Commission, on behalf of the public, is a third-party beneficiary of the contract and is entitled to receive notice of, and to intervene in, any law suit that is filed pertaining to this Agreement.**

The Commission notes that any court in a future proceeding regarding the Agreement may interpret this contract provision in its determination of the Commission's right to intervene. This possibility should not preclude the Commission from establishing what it believes to be the proper framework for proper regulatory oversight.

### **F. § VI.C., Interconnection--Collocation.**

The Commission will simply complete this section's reference to further discussion of collocation by **adding the number VII, making the reference Section VII.**

### **G. § VII., Collocation.**

The Commission will simply **add a heading entitled A. Collocation to repair an apparent oversight and complete this section.**

### **H. § VII., Collocation C. 1.-14.**

#### **1. The Contract Provision**

These sections contain the Parties' basic agreements regarding physical collocation. The provisions include ownership and responsibility for equipment, use of space, minimum size, separation of space, and US WEST and MFS responsibilities. Part 11 provides that MFS may not extend dark fiber to MFS's leased physical space or connect DS1/DS3 Channel Terminations to US WEST dark fiber.

#### **2. Commission Action**

With the exception of Part 11, these provisions are satisfactory.

In the Consolidated Arbitration proceeding, of which MFS has been a part, the Commission found that dark fiber is an unbundled network element. See, the Consolidated Arbitration Order at p. 23. Section 252(c) of the Federal Act requires the incumbent to provide unbundled access to network elements on a nondiscriminatory basis. Part 11 of this provision does not comply with this requirement of the Federal Act or with the Commission's findings in the Consolidated Arbitration Order.



**The Commission will condition its approval of the contract upon the Parties' striking Part 11 from this provision.**

**I. § XXX.A.3., Resale--Description of Services (including Appendix A)**

**a. The Contract Provision**

This section reads in full as follows:

Certain USWC services shall be available for resale at prices absent a wholesale discount. Such services include residence exchange service, private line, special access and switched access services, and packages of services comprised of services available for resale separately. These services are listed in Appendix A.

The RUD-OAG and the Department protested this provision in their public interest comments.

The RUD-OAG stated that this provision is inconsistent with the Federal Act and with the public interest. The Act creates the presumption that all retail services will be made available at an avoided cost discount--there should be no exception for residential services.

The RUD-OAG noted that MFS has no current desire to serve residential customers and is therefore willing to agree to the contract provision allowing a zero discount for the named services. The Commission should not, however, allow contract language which creates a disincentive for a new entrant to compete in the residential market.

The Department agreed with the RUD-OAG that this provision is contrary to federal law and the public interest. Section 251(c)(4) of the Act imposes a duty on LECs to make all telecommunications services they provide at retail available at wholesale rates--including residential services.

**b. Commission Action**

In the Federal Act, Congress expressly developed procedures to eliminate barriers to entry. The lack of a wholesale discount would create a barrier to entry into the resale market for residential service; such a barrier would deny residential customers the benefit of resale competition. This result would clearly be contrary to the public interest and the expressed intent of Congress. The public interest is best served by policies that encourage, not discourage, the competitive provision of telecommunications service.

The Commission also notes that its proposed rules for local competition, Docket No. P-999/R-95-53, require a local service provider (or LSP) to provide service to all customers within the LSP's service area boundaries, regardless of the customer's class. Part 7812.0600, subp. 3 provides in relevant part:

An LSP shall provide its local services on a nondiscriminatory basis, consistent with its certificate under part 7812.0300 or 7812.0350, to all customers who request service and whose premises fall within the carrier's service area boundaries...

If the proposed rules are adopted, MFS would be required to provide local service to any customer within its service area who requests service, whether the customer is business or residential.

For these reasons, the Commission will adopt the recommendation of the RUD-OAG and the Department that the resale discount of 21.5% established in the Consolidated Arbitration Order be extended to the retail services listed at § XXX.A.E of the proposed contract. The wholesale discount will thus be extended to: residence exchange service; private line; and packages of services comprised of services available for resale separately.

**The Commission will approve the contract, conditioned upon the Parties' adding the following language to the section: The resale discount of 21.5% established in the Consolidated Arbitration Order will be extended to the following services: residence exchange service; private line; and packages of services comprised of services available for resale separately.**

**J. § XXX.E.1., Resale--Appendix A**

**The Commission will require the Parties to revise Appendix A, which lists rates for resold services, to conform to the preceding Commission finding regarding wholesale rates.**

**K. § XXXI.A, Unbundled Access/Elements--General Terms**

**1. The Contract Provision**

In this section, US WEST agrees to provide the following unbundled network elements: local loop; local and tandem switches; interoffice transmission facilities; network interface devices; signaling and call-related database facilities; operations support systems functions; and operator and directory assistance facilities.

The Parties agree that US WEST will not restrict the types of telecommunications services MFS may offer through unbundled elements. US WEST agrees to perform, and MFS agrees to pay for, the functions necessary to combine requested elements in any technically feasible manner either with other elements from US WEST's network, or with MFS's elements.

**2. Commission Action**

The FCC Interconnection Order at Paragraph 283 states that unbundling of network elements beyond the local loop will be required unless the incumbent can prove to the state commission that: 1) the element is proprietary, or contains proprietary information that will be revealed if the element is provided on an unbundled basis; and 2) a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network.

The FCC Interconnection Order at Paragraph 285 directs the states, "when evaluating unbundling requirements beyond those identified in our minimum list, to consider whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer,

compared with providing that service over other unbundled elements in the incumbent LEC's network."

In the December 2, 1996 Consolidated Arbitration Order, the Commission found that subloop unbundling will promote competition by allowing the new entrant to use its own loop feeder plant where available and thus avoid paying for a whole loop. The Commission found that US WEST had failed to meet its burden of demonstrating under the FCC Interconnection Order that the subloop should not be unbundled. The Commission required US WEST to subloop unbundle at the feeder distribution interface.

**The Commission will require the Parties to insert language in this provision to bring the contract into conformity with federal rules and the decision previously reached by the Commission in the Consolidated Arbitration Order: US WEST must unbundle the following subloop elements: loop distribution; loop concentrator multiplexer; and loop feeder.**

**L. § XXXI.B, Unbundled Access/Elements--Description of Unbundled Elements**

**1. The Contract Provision**

This contract provision includes descriptions of the unbundled network elements under the contract and the Parties' agreements regarding ordering and maintenance of the elements.

**2. Commission Action**

This language is appropriate but incomplete. The provision should include descriptions of the subloop elements the Commission has included in the preceding section: loop distribution; loop concentrator multiplexer; and loop feeder. **The Commission will therefore require the Parties to add the following language to this provision: from the AT&T/MCI metro-US WEST contract, Attachment 3--§ 3.1.1 Loop Distribution; § 4.1.1. Loop Concentrator; and § 5.1.1 Loop Feeder.**

**IV. CONCLUSION**

The Commission has overseen the development of this contract from MFS's first request for interconnection, through arbitration, the filing of a partial agreement between US WEST and MFS, the consolidated arbitration proceeding settling disputed issues, the reconsideration process, and now the contract approval proceeding. Throughout the process, the Commission has followed its statutory duty and exercised its regulatory authority to facilitate the development of a contract consistent with Minnesota and federal law and the public interest.

In this final contract approval process, the Commission has looked to the Parties' final contract to determine if it is nondiscriminatory and consistent with the public interest, convenience, and necessity. After analyzing each contract term, the Commission has concluded that the contract is generally sound, equitable, and commercially reasonable. The Commission finds that the contract should be approved under § 252(e) of the Federal Act, with the condition that the Parties effect the changes enumerated in this Order. With those modifications to certain terms,

the contract will be consistent with federal and state law and regulations and the general public interest.

The Commission will therefore approve the contract, with the condition that the Parties develop and submit language consistent with the modifications specified.

### **ORDER**

1. The Commission approves the MFS/US WEST final contract under § 252(e) of the Federal Act, with the condition that the Parties develop and submit language consistent with the modifications specified in this Order. The Parties shall file the modified contract within seven days of the date of this Order. If the Parties cannot agree upon the language they shall file this information with the Commission.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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